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No. 84-1378

In the

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL RENARD,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, Paul S. Renard, hereby submits this reply brief to the brief of all of the Respondents except Roosevelt University in opposition to the Petition for Writ of Certiorari.

CORRECTED JURISDICTIONAL STATEMENT

A portion of the last sentence of the jurisdictional statement on page 2 of the Petition was omitted by typographical error. The said last sentence is hereby amended to read as follows:

> "The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) and this petition filed under 28 U.S.C. Sec. 2101(c)."

CORRECTIONS TO RESPONDENTS' SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the Respondents on page 1 of their brief to the effect that the facts of the case are stated in

the opinion of the Illinois Appellate Court is false. Since this case is presently concerned solely with a motion to dismiss the first amended complaint of the Plaintiff, as amended, the facts must necessarily arise from those pleadings. The statement of the case contained on pages 1 through 13 of the Petition is a complete and unbiased synopsis of those facts. (C 306-330, 341-343)

It should also be noted that not only have the Respondents been unable to show a single misstatement of fact in the Petition, they have also not challenged the allegations contained on pages 52 through 57 of the Petition which pointed out the omissions and substantial changes of facts made by the Appellate Court.

Most telling of all, however, is that the Respondents have omitted from their supplemental statement of the case

the same 11 items which were omitted from the telecast, and which are set forth on pages 32 through 35 of the Petition. They are thus attempting to conceal facts from this Court in precisely the same manner in which they concealed facts from the television audience. The first amended complaint alleges in detail and greatly expanded form that the statements of Bauer and Wallace, as set forth on page 4 of the Respondents' brief, are false. (C 319-320)

I

THE APPELLATE COURT MADE NO DETERMINATION THAT THE PROGRAM WAS DEFAMATORY WITHOUT REFERENCE TO THE INNOCENT CONSTRUCTION RULE AND THE FAIR COMMENT RULE

The Respondents state on page 6 of their brief as follows:

> "Thus, the Appellate Court ruled that the broadcast was not defamatory, i.e., 'it contained no false statements of fact injurious to

> plaintiff's reputation' . . . and that, alternatively, the allegedly defamatory statements were nonactionable expressions of opinion."

On page 7 of their brief, however, they change their minds that alternatively the statements were nonactionable opinions, and instead state as follows:

> "The lower courts applied the Illinois 'innocent construction rule' as an alternative basis for dismissing Petitioner's amended complaint - both courts squarely held, prior to applying the rule, that the broadcast simply did not contain a false statement of fact which could be construed, under any circumstances, as being injurious to Petitioner's reputation, business or profession." (Emphasis by the Respondents)

The above argument is, of course, absurd, since words that are not defamatory are by definition innocent, and therefore would never have any need for an innocent construction.

Apparently the pertinent portion of the Appellate Court opinion to which the Respondents refer is that contained in Petition Appendix page B-10, in which the court, immediately after analyzing the innocent construction rule, states as follows:

> "It is clear that the circuit court correctly determined as a matter of law that the 'Two on Two' segment featuring Plaintiff's music school was not defamatory. The segment merely examined two beginning piano courses and elicited an informal opinion from a third party as to the merits of

each; it contained no false statements of fact injurious to plaintiff's reputation."

At the outset, the following defects in these two sentences should be noted:

1. The Music Dynamics courses, with students taking lessons for two, three, and in one case twelve years, is obviously not a beginning course.

2. The court bases its decision on informal opinions, even though the Respondents had waived the fair comment rule.

3. The court finds there to be no false statements of fact because they are opinions, but as demonstrated in the Petition, since they do not meet the fair comment rule, the opinions are converted back into false statements of fact.

Every legal publication that has commented on this case has had problems

with the court's circular reasoning, and no legal publication whatsoever has ever found the court to have held there to be defamation without either or both the innocent construction rule and the use of nonactionable opinion.

Thus, in the headnotes to the official report of this case in 126 Ill. App. 3d 563, it is stated on page 563 as follows:

> "1. LIBEL AND SLANDER. Sec. 17-elicitation of informal opinions on merits of plaintiff's music school was nondefamatory as a matter of law. Broadcasters' elicitation of informal opinions on merits of plaintiff's music school was non-defamatory as a matter of law, under innocent construction rule, in absence of any false statements of fact to support claim of injury to plaintiff's business reputation on libel complaint."

In the headnotes to the official report of this case in 467 N.E. 2d 1090, it is stated on page 1091 as follows:

"3. Libel and Slander key 54

"Television program which showed piano teacher's students playing complex pieces at first sight while students from another school were shown playing a simplified, rehearsed piece, which did not inform audience of different circumstances under which students were performing, and which then elicted an informal opinion from a third party as to merits of each method of teaching contained no false statement of fact injurious to teacher's reputation, and thus, was not defamatory."

"4. Libel and Slander key 6(1)

"Third party's comments, made during television program showing piano

teacher's students playing complex pieces at first sight while students at second school were shown playing a simplified, reheased piece, that from tapes she had seen musical level in second program exceeded that in teacher's program and that she saw greater independence musically in works of students at second school, were merely her opinions as to merits of two programs featured in broadcast, and thus, comments were not actionable defamation of first school."

The Illinois Courts Bulletin, Vol. 30, No. 1, for September, 1984, on page 2 described the holding of the court as follows:

"Statements broadcast not actionable defamation where such comments, under any reasonable construction, con-

stituted mere opinion, not false statements injurious to plaintiff's reputation."

The Illinois Courts Bulletin description, despite its brevity, appears to be the most accurate analysis of all. The court applied the innocent construction rule to determine that the statements were opinions, and that since they were opinions, they could not be false statements of fact. The ruling, of course, arbitrarily and capriciously ignores the requirements of the fair comment rule which must be met before a statement can be considered a nonactionable opinion, arbitrarily and capriciously ignores the specific waiver of the fair comment rule by the Respondents, and arbitrarily and capriciously ignores the false implication rule, under which opinions are actionable, all of which were vigorously

asserted by the Petitioner. The Respondents have offered no explanation whatsoever for the failure of the Appellate Court to consider or even mention these three matters.

In view of the above interpretations, it is clear that if this case is allowed to stand, it will immediately begin to be cited as authority throughout the United States for false and defamatory statements in the form of opinions to be made with impunity, even though they have no factual basis and carry no false implication of knowledge. Such a philosophy does not spring from the First Amendment but arises rather from the dark tyrannical depths of propaganda minister Paul Joseph Goebbels.

II

THE INNOCENT CONSTRUCTION RULE AND THE ARBITRARY AND CAPRICIOUS ACTION OF THE APPELLATE COURT PRESENT IMPORTANT FEDERAL QUESTIONS THAT ARISE IN THIS CASE

It is well settled in Illinois that it is the judgment and not the opinion of the trial court that is the subject of review of the Appellate Court, and the Appellate Court is not bound by the reasons given by the trial court in sustaining its judgment. People ex rel. Rusch v. Fusco, 397 Ill. 468, 74 N. E. 2d 531 (1947). Thus, it is the reasoning and opinion of the Appellate Court, and not the trial court, which is to be considered in determing the Federal questions presently existing under this case.

As has been clearly shown in the preceding section, the Appellate Court reached its determination of no defamation by means of analyzing and then applying the innocent construction rule.

In order to sustain this rule, it was held that it does not violate the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. As was pointed out in the Petition, perhaps as many as one half of all persons bringing defamation suits in Illinois are denied recovery because of this rule. The Respondents have not been able to cite any constitutional authority whatsoever to refute the cases and reasoning cited in the Petition, but instead rely on the policy arguments in Chapski v. Copley Press, 92 Ill. 2d 344, 442 N. E. 3d 195 (1982). The policy of a rule of law, however, has nothing to do with whether its effect is to deny due process and equal protection of the law.

Arbitrary and capricious acts and decisions in civil actions are just as detrimental to the rights of individuals

and to the judicial system itself as they are when they occur in criminal matters. Although the Supreme Court has assiduously acted to make clear that it will not tolerate such conduct in the criminal field, it has not done so in civil matters. The present case presents an overwhelming opportunity for the Court to clarify the equal importance that civil actions also be free of arbitrary and capricious conduct.

The present case contains not just an isolated arbitrary and capricious act, but a plethora of them. The Petition sets forth a minimum of 18 separate arbitrary and capricious acts and omissions taken by the Appellate Court in one short opinion. Moreover, the opinion deals with a motion to dismiss, under which there is no factual controversy. While it is understandable that a court

might make one or two judicial errors, the commission of 18 separate items in the face of briefs that pointed out these items, and not involving any factual controversy, precludes any possibility that this was merely an error, and can only be explained as arbitrary and capricious judicial action.

The Respondents in their brief take the position that American Railway Express Co. v. Kentucky, is the only case which a petitioner can rely on in connection with arbitrary and capricious action, but this is not so. Other cases to the same effect are Corrigan v. Buckley, 271 U. S. 323 (1926), West v. Louisiana. 194 U. S. 258 (1904), and Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930).

III

THE FAIR COMMENT RULE AND FALSE IMPLICATION RULE ARE PROPERLY RAISED BY THE PETITIONER

The position of the Respondents set forth in footnote 6 on page 12 of their

brief, to the effect that since the Respondents did not raise the fair comment privilege nor was it decided by the trial or appellate courts, the Petitioner may not now raise it can only be described as weird. It is not the failure to raise the fair comment privilege to which the Petitioner objects. It is that the failure of the Respondents to meet its requirements precludes any part of the program from being legally considered an opinion, and thereby contravenes the Appellate Court's finding of no false statement of fact. Petitioner raised this defect in his lower court briefs.

Equally weird is the Respondents' assertion in the same footnote that the false implication rule is a doctrine with which they are not familiar.

This doctrine, which was raised in the lower court, is set forth on page 47

of the Petition, where the following statement is quoted from Catalano v. Pechous, 69 Ill. App. 2d 797, 387 N.E. 2d 714 (1st Dist., 1979):

> "Even assuming that this statement was merely one of opinion, liability for libel may attach with a negative characterization of a person coupled with a clear but false implication that he was privy to fact about the plaintiffs and their actions . . . ." (Emphasis supplied)

The doctrine is derived by the court from the basic holding of Hotchner v. Castilleo-Puche, 551 F. 2d 910 (2d Cir. 1977), which astoundingly is cited by the Respondents on page 12 of their brief.[1, 2]

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[1]The Respondents in footnote 5 on page 9 of their brief argue that since the due process and equal protection arguments had not been included in the Petitioner's "Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal" filed with the Illinois Supreme Court, they had not been presented to the highest court

in the state in which a decision could be had, and therefore had been waived. They cite as authority Matthews v. Huwe, 269 U.S. 262 (1925), Beck v. Washington, 369 U.S. 541 (1962), Bailey v. Anderson, 326 U.S. 203, and Illinois Revised Statutes, Chapter 110A, Sections 315(b)(3), 315(g), and 341(e)(7).

At the outset, it should be noted that all three of the above cases hold that there to be no Federal requirement as to how state appellate procedure is to be followed, it only being necessary that the Petition follow state procedure. The Matthews case held the ruling of the highest court of a state in reviewing to take jurisdiction of the case would not be examined unless such refusal was on the merits, and that there was a waiver when there was a complete failure to file for a writ of error in the state supreme court. The Beck case and the Bailey case both held there to be a waiver not because the matter had not been raised in the highest court of the state, but because it had not been raised in the lower court.

Illinois does not require that all matters sought to be reviewed must first be raised in the initial petition filed with the Illinois Supreme Court. In Aurora, E & C. R. Co. v. Ruch, 243 Ill. 474, 90 N.E. 924 (1910), the Illinois Supreme Court, in analyzing a petition for writ of certiorari under a former similar practice, specifically held that it was not expected that every question of law and fact arising in every aspect of the case be raised and discussed in the petition, since this is the purpose of the brief. Illinois Revised Statutes, Chapter 110A, Section 341(e)(7), cited by the Respondents, is in consonance with this policy, and provides not that points not raised in the petition are waived, but rather that points not raised in the brief are waived. Since the petition was denied, no brief was filed, and there was no hearing on the merits.

Dated: May 8, 1985
Chicago, Illinois

Respectfully submitted,

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[2]The Respondents in footnote 7 on page 12 of their brief point out that the Petitioner did not raise in the Appellate Court the issue of arbitrary and capricious exercise of power in the trial court.

This issue was not raised in the Appellate Court because it did not appear that the action of the trial court was arbitrary and capricious.

The trial court attached to its opinion an entire and unedited transcript of the broadcast, and held that the broadcast could be innocently construed as an innocuous comparison. Under this portion of the ruling it was irrelevant that opinions were involved because their contents were not defamatory. Although the Petitioner disagreed with the trial court's ruling there was nothing to indicate that it was arbitrary and capricious. The Appellate Court, on the other hand, changed and omitted facts contained in the broadcast, and held it not to be defamatory not because it was an innocuous comparison, but because it could be innocently construed to contain no false statements of fact. This ruling was totally dependent on the fair comment and false implication rules, which the court ignored. The Petitioner regarded such conduct as arbitrary and capricious, and even the Respondents can offer no explanation for it.